

ATTORNEY GENERAL OF TEXAS GREG ABBOTT

July 6, 2004

Mr. Joe Gorfida, Jr. Mr. David M. Berman Nichols, Jackson, Dillard, Hager & Smith, L.L.P. 1800 Lincoln Plaza 500 North Akard Dallas, Texas 75201

OR2004-5468

Dear Mr. Gorfida and Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204659.

The City of Duncanville (the "city"), which you represent, received two requests from different requestors encompassing twelve categories of information relating to the city's selection of a "Special Events Coordinator." You state that the city does not maintain some of the requested information. You also state that the city cannot produce to one of the requestors two of the requested categories of information without the city having to "manually search[] the personnel files of all [c]ity employees and compil[e] the requested data." You indicate that portions of the requested information are excepted from disclosure

We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); Economic Opportunities Dev. Corp. of San Antonio v. Bustamante, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

² We note that these two categories of the requested information are "[t]he names, race, gender of all [city] employees that are exempt, management level, supervisory personnel, that meet the US Department of Labor criteria for exempt employees that are specifically African-American or Hispanic and or currently employed by the [city]" and "[t]he current percentage ratio of African-American and Hispanic employees that work in the capacity of exempt professional, management or supervisory capacity" (collectively, the "exempt employee information"). Although you indicate that responding to these particular categories of the requested information would be administratively burdensome, we note that the Act does not excuse a failure to comply with the Act on the basis that compliance would be inconvenient or difficult. See Indus. Found. v. Tex. Indus.

pursuant to sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestors. See Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) provides in pertinent part that a governmental body that claims that requested information is excepted from disclosure must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples of the information, if a voluminous amount of information was requested, labeled to indicate which exceptions apply to which parts of the information. See Gov't Code § 552.301(e). To date, the city has not provided us with a copy of, or representative samples of, the exempt employee information. Consequently, we find that the city has failed to comply with the procedural requirements of section 552.301 in requesting a decision from us with regard to this particular information.

Because the city failed to comply with the procedural requirements of section 552.301, this particular information is now presumed public. See Gov 't Code § 552.302; see also Hancock v. State Bd. of Ins., 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); City of Houston v. Houston Chronicle Publ'g Co., 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The city must demonstrate a compelling interest in order to overcome the presumption that this particular information is now public. Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or when third party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Although the city claims that this particular information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that may be waived by the city. Accordingly, we conclude that the city may not withhold any portion of the exempt employee information under section 552.103 of the Government Code. Consequently, the city must release this particular information to the requestor.

Accident Bd., 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); see also Dallas Area Rapid Transit v. Dallas Morning News, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not generally constitute compelling interests that are sufficient to overcome the presumption that requested information is presumed public.

We now address your section 552.103 claim with respect to the submitted information. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

. . .

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The city maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. To meet this burden, the city must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. See Univ. of Tex. Law Sch. v. Tex. Legal Found., 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

In demonstrating that litigation is reasonably anticipated, the city must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. See Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit,

⁴ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. See Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You indicate that the city anticipates litigation in this matter because one of the requestors' request for information was carbon copied to "JI, Attorney at the Department of Labor" and because it contained "Dad: Duncanville is still ran by 'good ole white boys' they refuse to reflect minority population I will pay a lawyer." After carefully reviewing your representations and the submitted information, we find that the city has failed to adequately demonstrate that it reasonably anticipated litigation with regard to this matter on the date that it received either request for information. Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.103 of the Government Code.

You indicate that portions of the submitted information are excepted from disclosure pursuant to section 552.117 of the Government Code. We note that section 552.117(a)(2) excepts from disclosure the home address and telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. See Gov't Code \$552.117(a)(2). Accordingly, we conclude that the city must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code.

We also note section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). The determination of whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be made as of the date of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality under section 552.024 for the information prior to the city's receipt of this request for information. Information may not be withheld by the city under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely request for confidentiality for such information under section 552.024. You have submitted documentation that reflects that some current or former employees of the city elected confidentiality for all of the information encompassed by section 552.117(a)(1) prior to the date that the city received the first request for information. Accordingly, we conclude that the city must withhold the information that we have marked pursuant to section 552.117(a)(1).

⁵ Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. See Crim. Proc. Code art. 2.12.

We are unclear whether any of the remaining individuals portrayed in the submitted information were either current or former employees of the city on the date that the city received the requests for information. Thus, to the extent that these individuals were current or former employees of the city on the date that the city received the first request and requested confidentiality for the information encompassed by section 552.117(a)(1) prior to that same date, the city must withhold from the first requestor the information that we have marked pursuant to section 552.117(a)(1). Further, to the extent that these individuals were current or former employees of the city on the date that the city received the second request and requested confidentiality for the information encompassed by section 552.117(a)(1) prior to that same date, the city must withhold from the second requestor the information that we have marked pursuant to section 552.117(a)(1) of the Government Code.

Regardless of the applicability of section 552.117(a)(1), we note that these individuals' social security numbers may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.⁶ The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). The city has cited no law, nor are we are aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the city should ensure that they were not obtained and are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. In any event, we note that the first requestor has a special right of access to his own social security number. See Gov't Code § 552.023 (person has special right of access to information held by governmental body that relates to person and is protected from disclosure by laws intended to protect that person's privacy interests).

Furthermore, we note that e-mail addresses that are contained within the remaining submitted information are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

⁶ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
 - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses contained within the remaining submitted information that are excepted from disclosure under section 552.137(a). Unless the city has received affirmative consent for the release of these marked e-mail addresses, we conclude that it must withhold the addresses pursuant to section 552.137(a) of the Government Code.

Finally, we note that portions of the remaining submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. See Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. See id. If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the

are excepted from disclosure under section 552.137(a). Unless the city has received affirmative consent for the release of these marked e-mail addresses, we conclude that it must withhold the addresses pursuant to section 552.137(a) of the Government Code.

Finally, we note that portions of the remaining submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. See Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. See id. If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No.550 (1990).

In summary, the city must release the requested exempt employee information to the first requestor. The city must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code. To the extent that the information that we have marked under section 552.117(a)(1) is associated with an individual who was a current or former employee of the city on the date that the city received the first request and requested confidentiality for the information encompassed by section 552.117(a)(1) prior to that same date, the city must withhold that information from the first requestor pursuant to section 552.117(a)(1) of the Government Code. To the extent that the information that we have marked under section 552.117(a)(1) is associated with an individual who was a current or former employee of the city on the date that the city received the second request and requested confidentiality for the information encompassed by section 552.117(a)(1) prior to that same date, the city must withhold that information from the second requestor pursuant to section 552.117(a)(1) of the Government Code. Regardless of the applicability of section 552.117(a)(1), some social security numbers contained within the remaining submitted information may be confidential under federal law. Unless the city has received affirmative consent for the release of the e-mail addresses that we have marked, the city must withhold them pursuant to section 552.137(a) of the Government Code. The city must release the remaining submitted information to the requestor; however, in doing so, the city must comply with the applicable copyright law for those portions of the information which are copyrighted.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Ronald J. Bounds

Assistant Attorney General Open Records Division

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RJB/krl

Ref:

ID# 204659

Enc.

Marked documents

c:

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